U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

In the Matter of Jerome Whaley v. Chicago Police Department and City of Chicago	79-CETA-121

Decision on Remand

This matter was remanded to me by the United States Court of Appeals for the Seventh Circuit for reconsideration of the award of back pay to the complainant Mr. Whaley in light of the First Circuit's decision in City of Boston v. Secretary of Labor, 631 F.2d 156 (1980). The parties were given an opportunity to brief the issues under a briefing schedule issued on August 16, 1982, and each party has filed a brief.

The facts in this case are not in dispute. Jerome Whaley started work as a CETA (presumably Public Service Employment) employee of the City of Chicago as a civilian detention aide in the Police Department on January 13, 1975. He worked in the lockup in district police stations. In the year and a half from January 13, 1975 until he was terminated on July 21, 1976, Mr. Whaley was absent on sick leave or leave without pay for 85 days and took 11 days of vacation. In 1976, there were three incidents in which he did not report for duty and failed to notify his supervisors, or did not follow medical leave proce-

dures. Mr. Whaley had an explanation or excuse for each incident, but chose to waive his right to a hearing. Disciplinary suspensions were imposed in each case. The Rules and Regulations of the Police Department specifically provide that employees shall be given written notice of charges against them and provide detailed pre-hearing and hearing procedures which must be followed prior to taking disciplinary action. These procedures were followed prior to Mr. Whaley's suspensions, but not his termination. Another allegation of failure to report for duty and notify supervisors in advance was pending in July 1976 when the watch captain recommended to the District Commander that Mr. Whaley be terminated, and the District Commander concurred in that recommendation.

The watch captain wrote a memorandum to the District Commander detailing Mr. Whaley's poor attendance record and failure to follow' procedures for taking leave. Mr. Whaley was not shown that memorandum. Mr. Whaley was never given any written or official oral notification of his termination or the reasons for it. He learned of it from a co-worker when he returned from vacation in July 1976. Mr. Whaley asked the Assistant District Commander about it, but he would only confirm that Mr. Whaley had been terminated. He was not allowed to work when he returned from vacation. Later, he spoke to the District Commander about it but he also would only say he had ordered Mr. Whaley's termination. When Mr. Whaley inquired in the personnel office they also would not tell him the reason for his termination.

Mr. Whaley filed a complaint about his termination with the Mayor's Office of Manpower on September 28, 1977. A hearing was held on his complaint on November 21,1978 and his grievance was denied. He then filed a complaint with the Department of Labor.

Discussion

The basic principles underlying a CETA participant's right to written notice and an opportunity to respond before adverse action is taken against him, and the policies to be furthered by the award of back pay for violation of these procedural requirements, were set forth in my decision in the Matter of Allen Gioielli 79-CETA-148 (pp. 4-S; 9-10). Since that decision was issued, I have also decided the case of Blanche Field v. City of Boston, 77-CETA-102 (copy attached), which had been remanded by the United States Court of Appeals for the First Circuit for reconsideration of the award of back pay. Gioielli and Blanche Field are instructive as to when back pay should be awarded for a procedural violation, and when it should not because the violation was harmless error. As I explained in Gioielli, the purpose.of awarding back pay is to carry out the purposes of CETA by making the participant whole for the loss suffered. If, as required by the regulations, a participant could not be discharged before giving him notice and an opportunity to respond, a participant such as Mr. Gioielli would have been employed for a longer period of time before being terminated. It is that loss for which back pay serves to compensate him and at the same time spur CETA recipients to comply with the

regulations. A number of cases in analagous labor law areas have held that employees should be paid back pay for losses due to procedural violations without regard to the merits of their case. Even if their discharge or other adverse action is ultimately upheld, the procedural violation is not "harmless error" unless it had no effect on the fundamental fairness of the'procedures. Here, by definition under the regulations, fundamental fairness requires pre-termination notice and an oppurtunity to respond. In Blanche Field, the participant did have actual, although oral, notice of the reason for refusal to hire her.

I would also reiterate several other points made in the Gioielli decision. while it is true that a CETA employee does not have a constitutionally protected property or liberty interest in his job, he is entitled to the procedures mandated by Department of Labor regulations. (29 CFR 98.26 (1976) were the procedures applicable at the time.)[1/] It is also implicit in the requirement that a CETA participant be given written notice, an opportunity to respond, and later an informal hearing, that the grantee have reasons for the adverse action. No purpose would be served by giving notice of adverse action if it could be taken for no reason, or an opportunity to respond if it were permissible for any arbitrary reason. Furthermore, as I pointed

1/ while it is not necessary to the decision in this case, I would also note that under 29 CFR 98.24(b), Mr. Whaley was entitled to the procedures in the Chicago Police Department Rules and Regulations.

out in Gioielli, Carey v. Piphus, 435 U.S. 247 (1978) does not exclude the award of damages for procedural violations; it only requires that actual damages be proved. Here, there is no doubt that Mr. Whaley would have been employed by the Police Department for some longer period of time beyond July 21, 1976 if proper procedures had been followed. His damages are the pay he would have earned for that period. (See discussion below for appropriate determination of that period.)

Back pay, however, is a discretionary remedy to be awarded so that it furthers the purposes of the Act. Whether it should be awarded and the amount of the award, therefore, turns on the specific facts of each case so that those purposes will be advanced.

Chicago's central argument is that Mr. Whaley was aware of the reasons for his termination because he knew about his poor attendance record and prior discipline. Thus, Chicago claims, he had actual notice of the reasons for his discharge; failure to give him formal written notice was at most a technical violation. I cannot agree. It would not have been unreasonable for Mr. Whaley to assume that, having been disciplined for the three attendance incidents, those matters were closed. Furthermore, the record does not indicate that, as bad as his overall attendance was, Mr. Whaley was ever warned about it or reprimanded for it.[2/] Moreover, although he waived his right to a hearing

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2/ I note that the Chicago Police Department General Order on Complaint and Disciplinary Procedures requires counseling of employees for repeated minor infractions (paragraph I).

on each incident, Mr. Whaley did present explanations or excuses as mitigation. At the time, if he had been told that these incidents formed part of the basis for his discharge, he may have more vigorously argued the mitigating circumstances in defense to a notice of discharge.

This case, therefore, is quite different from City of Pine Bluff, Ark. v. U.S. Department of Labor, 658 F.2d 577 (8th Cir. 1981) cited by Chicago. There, the terminated CETA employee had actual notice of the reasons for the adverse action, although she obtained it in an unusual way. (She was shown a memo from the Mayor to her supervisor about the incident which led to the adverse action, and she saw a draft copy of a letter from her supervisor which set forth the problems he was having with her.) In addition, a hearing was convened on her grievance two days later.

Similarly, this case differs in the critical respect of notice from the facts in Blanche Field supra. There was no doubt in that case that Ms. Field had actual, although oral, notice of the reasons for Boston's refusal to hire her. Where such notice is undisputed and sufficient in the circumstances, I held that failure to give written notice is harmless error because it did not undermine the fairness of the proceedings. The same cannot be said, for the reasons discussed above, for notice based on what the participant, from the recipient's point of view, should have known.

However, for a number of reasons, I find the ALJ's back pay award to be excessive. Mr. Whaley waited over a year to

file a complaint with the Mayor's Office of Manpower.[3/] There is nothing in the record to explain why a hearing was not held for more than a year thereafter; absent same explanation, both parties should bear some responsibility for the delay. It is difficult to believe that Mr. Whaley and his counsel would let so much time pass, and go into a hearing on his discharge, without knowing what the hearing would be about, or making vigorous efforts to find out. At the hearing, Mr. Whaley did not protest his discharge or the reasons for it, but sought reinstatement and back pay solely on procedural grounds, yet in his brief before me he concedes that the procedural violation was cured when the hearing was held. From these facts, it would be reasonable to infer either that Mr. Whaley found out the reasons for his discharge some time before the hearing but did not challenge them because he had no defense, or that he deliberately chose to remain- ignorant of them because it preserved his claim that a procedural violation continued for over two years. Finally, in view of Mr. Whaley's poor attendance record, which formed the basis of a discharge he never protested on substantive grounds, in calculating any back pay Mr. Whaley should not benefit from a presumption that he would have been present each and every work day.

3/ Although under present law a complaint may be filed up to a year after the alleged occurrence (20 CFR 676.83(a)(4)), a hearing would be held within 30 days (20 CFR 676.83(c)) and a decision issued in 60 days (20 CFR 676.83(c)(9)), or a complaint could be filed with the Department of Labor. (20 CFR 676.85(b)(1)).

In conclusion, on all the facts in this case, I consider it appropriate to carry out the policies of CETA and the Department of Labor regulations on adverse action procedures to award back pay for the period from Mr. Whaley's termination to the end of 1976, calculated by the ALJ to be $5,500.

Therefore, it is ORDERED, that the City of Chicago pay back pay to Jerome Whaley in the amount of $5,500, less all legal deductions for the period July 21, 1976 to Dec. 31, 1976.

Raymond J. Donovan
Secretary of Labor

Signed at Washington, D.C.
Nov. 30, 1982

CERTIFICATE OF SERVICE

Case Name: Jerome Whaley v. Chicago Police Department and City of Chicago

Case No.: 79-CETA-121

Document: Decision on Remand

This is to certify that a copy of the foregoing document was mailed to the parties listed below on December 1, 1982.

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